STATE OF MICHIGAN
IN THE MICHIGAN SUPREME COURT

HUDSON, **BOOKER T., JR.,**
Defendant- Appellant,

v No. 06-12345

PEOPLE OF THE STATE OF MICHIGAN,
Prosecutor-Appellee.

APPELLEE'S BRIEF

ORAL ARGUMENT REQUESTED

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STATEMENT OF THE QUESTIONS INVOLVED

I

WAS THE SEARCH OF DEFENDANT'S HOUSE PURSUANT TO A VALID SEARCH WARRANT IN COMPLIANCE WITH THE FOURTH AMENDMENT OF THE UNITED STATES CONSTITUTION, ARTICLE 1, § 11 OF THE MICHIGAN CONSTITUTION, AND MCL 780.656?

Defendant answers "No"

The People answer "Yes"

II

SHOULD THE CRACK COCAINE OBTAINED DURING A SEARCH PURSUANT TO A VALID SEARCH WARRANT BE PERMITTED INTO EVIDENCE WHERE THE ONLY CLAIM OF ERROR IS THAT THERE WAS ONLY 3-5 SECONDS BETWEEN THE 'KNOCK AND ANNOUNCEMENT' BY THE OFFICERS AND ENTRY INTO DEFENDANT'S HOUSE?

Defendant answers "No"

The People answer "Yes"

STATEMENT OF FACTS

The facts presented by the Defendant are essentially accurate, but incomplete. This Court should also be apprised of the fact that the validity of the search warrant was never challenged below; the challenge is limited to whether a five to ten second variance from the generally accepted guidelines under the knock-and-announce rule violates the United States and Michigan Constitutions and MCL 780.656. Because the validity of the search warrant was not challenged, it is uncontested that probable cause (a higher standard than reasonable cause) supported its issuance.

Also missing from the facts presented by Defendant is that Officer Good, the lead police officer in the search, had been shot at previously in drug raids. Additionally, a loaded gun was also found during the search. These facts are important in determining whether exigent circumstances existed for the immediate entry onto the premises.

STATEMENT OF JURISDICTION

The People accept Defendant's Statement of Jurisdiction.

ARGUMENT

I.

THE SEARCH OF DEFENDANT'S HOUSE PURSUANT TO A VALID SEARCH WARRANT DID NOT VIOLATE THE FOURTH AMENDMENT OF THE UNITED STATES CONSTITUTION, ARTICLE 1, § 11 OF THE MICHIGAN CONSTITUTION, OR MCL 780.656.

Standard of Review

This Court decides questions of law *de novo*.[1]

Discussion

Appellant has premised his entire appeal on the theory that a small variance in time, at most ten seconds, from the guidelines of the knock-and-announce rule makes the entire search unreasonable and in violation of the Fourth Amendment of the United States Constitution, Article 1, § 11 of the Michigan Constitution, and MCL 780.656. This theory must fail for several reasons.

First, because the search was pursuant to a valid search warrant, which requires *probable* cause to issue, the search clearly meets the lesser *reasonable* standard of the provisions above. A minor defect in the manner of entry to the premises does not make the *warrant* defective. The cases developing the reasonable standard for searches and seizures typically have dealt with searches conducted without a warrant, or where the warrant was defective, in which event the issues have been evaluated as though there were no warrant.

Second, the "exigent circumstances" analysis for immediate entry is applicable only where reasonableness of the search must be established, not where, as here, the

[1] *People v. Stevens*, 460 Mich 626 (1999), *cert den* 528 US 1164 (2000).

reasonableness has been established by a valid search warrant. Thus, the Court need not reach this analysis.

Third, Appellant bases his challenge to the entry on his argument that no exigent circumstances existed to justify an immediate entry. Here, the warrant authorized a search for weapons and drugs. It hardly requires saying that rocks of crack cocaine are easily destroyed. Further, the authorization to search for weapons established probable cause to believe that weapons were present on the premises, which obviously would present a danger to the officers and to others in the building. The likelihood that both drugs and weapons would be found increased the threat of violence and the prospect that the drugs would be destroyed, since a drug dealer would have a heightened desire to use the weapons against police to avoid a seizure of valuable drugs and cash gained from drugs transaction, or to use weapon to forestall police entrance while the drugs were destroyed. Moreover, the lead police officer had been shot at a number of times during earlier drug raids, and from those experiences, had a reasonable expectation of violence from within the premises when executing the warrant.

A. Where a search was executed pursuant to a valid search warrant, probable cause warranting the search has been established, and a small deviation from the knock-and-announce time guidelines does not affect the reasonableness of the search.

It is uncontested below, and not contested here, that the search was pursuant to a valid search warrant. US Constitution, Am. IV states:

> The right of the people to be secure in their persons, houses, papers, and effects, against *unreasonable searches* and seizures, shall not be violated, and *no Warrants shall issue, but upon probable cause*, supported by oath or

> affirmation, and particularly describing the place to be searched, and the persons or things to be seized. (Emphasis added.)

The Constitution, thus, has set the high standard of *probable cause* in order for a warrant to issue, in order to ensure the reasonableness of the *search*. Mich. Const. 1963, Art. I, § 11 provides the same standards:

> The person, houses, papers and possessions of every person shall be secure from *unreasonable searches* and seizures. *No warrant to search* any place or to seize any person or things *shall issue* without describing them, nor *without probable cause*, supported by oath or affirmation. (Emphasis added.)

The Defendant details the evolution of the knock-and-announce rule, but fails to recognize that the cases he cites do *not* support his position. Defendant states:

> The common law "knock and announce" principle is a fundamental part of the inquiry as to whether a search and seizure was reasonable. In evaluating the scope of this right, the United States Supreme Court has looked to the traditional protections against unreasonable searches and seizures afforded by the common law at the time of the Constitution's framing. Def. brf., p. 5.

The earliest common law cases cited by Defendant *authorize* the police to break down the doors to a house after announcing their presence and purpose.[2] It is uncontested here that the police *did* announce their presence and purpose before entering. Nothing in these cases refers to any time passage required for an entry. Other cases cited by Defendant again require announcement, but specify no time before entry. *Wilson v. Arkansas*,[3] a 1995 United States Supreme Court decision cited by Defendant, provides:

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[2] Def. Brf. P.6, citing *Semayne's Case*, 5 Co. Rep. 91a, 91b, 77 Eng. Rep. 194, 195 (K. B. 1603). 2 W. Hawkins, Pleas of the Crown, ch. 14, §1, p. 138 (6th ed. 1787); 1 M. Hale, Pleas of the Crown *582

[3] Id.

> [We] hold that *in some circumstances* an officer's unannounced entry into a home *might* be unreasonable under the Fourth Amendment. (Emphasis added.)

This is hardly, as Defendant claims, a clear pronouncement that a delay of 15 seconds before entry is required in the case of a valid search warrant. To the contrary, *Wilson* establishes that the general rule is that an unannounced entry is presumed to be reasonable, except in certain limited circumstances, where it *might* be unreasonable. Similarly, in *People v Davis*,[4] a recent Michigan Supreme Court case, this Court held:

> [In] order to show that a search was legal, the police must show *either* that they had a warrant, *or* that their conduct fell under one of the narrow, specific exceptions to the warrant requirement. (Emphasis added.)

In separating the requirements for a legal search, this Court establishes clearly that where a warrant exists, it is not necessary to show that the police conduct falls within the exigency exceptions. The exigency analysis is appropriate only where a warrant has not been obtained.

MCL 780.656 does not require more than the Fourth Amendment of the United States Constitution or Article 1, § 11 of the Michigan Constitution. MCL 780.656 provides:

> The officer to whom a warrant is directed, or any person assisting him, may break any outer or inner door or window of a house or building, or anything therein, in order to execute the warrant, if, after notice of his authority and purpose, he is refused admittance, or when necessary to liberate himself or any person assisting him in execution of the warrant.

[4] 442 Mich 1, 572 - 573 (1993), *cert den* 508 US 947 (1993)

This simply requires that the police must announce their presence before entering a building to execute a search warrant. In *United States v Ramirez*,[5] The United States Supreme Court held that 18 USC § 3109 (the federal counterpart to MCL 780.656) was merely a codification of the common law and was to be interpreted consistently with the Fourth Amendment. Likewise, MCL 780.656 is a codification of the common law of Michigan, and does not impose requirements beyond those of Article 1, § 11.

From the cases cited by Defendant, it is apparent that where a search has been conducted pursuant to a valid search warrant, which requires *probable* cause to issue, it is only required that the search be announced before entry. Even if a time requirement before entry was read into the constitutional provisions or MCL 780.656, a minor defect in the manner of entry to the premises does not make the *warrant* defective. See *Davis, supra*.[6] The *search* is still legal.

Additionally, the cases developing the "reasonable standard" for searches and seizures typically have dealt with searches conducted without a warrant, or where the warrant was defective, in which event the issue is to be evaluated as though there were no warrant.

The "exigent circumstances" analysis for immediate entry is applicable only where the reasonableness of the search must be established – warrantless searches, or searches where the warrant was defective. This analysis does not apply here, where the legality of the search was established by a search warrant, the validity of which is unchallenged.

[5] 523 US 65; 118 S Ct 992; 140 L Ed 2d 191 (1998).
[6] 442 Mich 1, 572 - 573 (1993), *cert den* 508 US 947 (1993)

Accordingly, Appellee submits that this Court need only follow its own and the United States Supreme Court's precedents, and conclude that a search is presumed legal where executed pursuant to a valid search warrant, and that the manner of entry does not make the search illegal.

B. Exigent circumstances existed to justify the nearly immediate entry into the residence; thus the search violated no constitutional or statutory provision.

As discussed above, once this Court concludes that a valid search warrant existed for the search of Defendant's premises for weapons and drugs, it is unnecessary to evaluate this case for exigent circumstances. In the event the Court chooses to conduct an exigent circumstances analysis, the People submit that exigent circumstances clearly existed here for an immediate entry of the premises following the police announcement of their presence.

Defendant argues that the probability that drugs and weapons would be found on the premises was insufficient to establish exigent circumstances, in spite of the valid search warrant, specifying that the search was for drugs and weapons. To support his argument, Defendant cites cases from other state jurisdictions, which are not precedential or binding on this Court, and which, in most instances, involve facts quite different from the facts of this case.[7]

This Court should instead look to United States Supreme Court decisions for guidance.

[7] *Kornegay v Cottingham*,120 F3d 392 (CA 3, 1997), *United States v Dupras*, 980 F Supp 344 (D Mont, 1997) *State v Russell*, 1998 WL 357 (Ohio App, 1998), *Wynn v State*, 117 Md App 133 (1997).

Under *Richards v. Wisconsin*,[8] the Court held that a no-knock entry is justified if police have a "reasonable suspicion" that knocking and announcing would be dangerous, futile, or destructive to the purposes of the investigation.

In *Wilson v. Arkansas*,[9] the Court concluded that "the common-law principle of announcement is 'an element of the reasonableness inquiry under the Fourth Amendment,' but noted that the principle 'was never stated as an inflexible rule requiring announcement under all circumstances.'"

Moreover, when the knock-and-announce rule does apply, the standard is vague. In *United States v. Banks*,[10] a drug case similar to this, the United States Supreme Court held that the proper measure is not how long it would take for the resident to reach the door, but rather, how long it would take to dispose of the suspected drugs. Here, the rocks of crack cocaine could readily and quickly be disposed of, and the police were justified in their near-immediate entry.

In *United States v. Ramirez*,[11] The Court held that an immediate entry into the home was appropriate based on exigent circumstances where the confidential informant had told authorities that appellee *might* have a stash of guns and drugs hidden in his garage. The Court held that "[t]he police certainly had a 'reasonable suspicion' that knocking and announcing their presence might be dangerous to themselves or to others."

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[8] 520 U.S. 385, 394 (1997)

[9] 514 U.S. 927 (1995)

[10] 540 U.S. 31, 41 (2003)

[11] 523 US 65, 71, n 2 (1998)

"[I]n determining the lawfulness of entry and the existence of probable cause we may concern ourselves only with what the officers had reason to believe at the time of their entry," *Ker v . California.*[12] In that case, having reason to believe that one of the petitioners was selling marijuana and had just purchased some from a person who was known to be a dealer in marijuana, California police officers, without a search warrant, used a passkey to enter the apartment occupied a husband and wife, arrested them on suspicion of violating the State Narcotics Law, searched their apartment, and found three packages of marijuana, which they seized. The Court found that there was probable cause for the arrests; that the entry into the apartment was for the purpose of arrest and was not unlawful; and that the search, being incident to the arrests, was likewise lawful and its fruits admissible in evidence.

In this case, the warrant was for drugs and weapons. Because it is uncontested that the warrant was valid, it is uncontested that "probable cause" existed to believe that the evidence on the premises could readily be destroyed or otherwise disposed of, and that the Defendant would be armed and a threat to the officers. To suggest otherwise reveals a naivete regarding the realities of law enforcement, to which neither the police nor the courts can afford to accede..

Because probable cause existed to believe that *both* drugs and weapons would be found, the potential for violence and the likelihood that the drugs would be destroyed was elevated further, since a drug dealer would have a heightened desire to use the weapons against police to avoid a seizure of valuable drugs and cash gained from drugs transaction, or to use weapon to forestall police entrance while the drugs were destroyed. Moreover, the lead police officer had been shot at a number of times

[12] 374 U.S. 23, 40 (1963)

during earlier drug raids, and from those experiences, had a reasonable expectation of violence from within the premises when executing the warrant. What matters is what the officers had reason to believe at the time of their entry," *Ramirez, supra*.[13] Certainly, Officer Good's reasonable belief, based on his past experience in similar situations, was that searches for drugs often placed police officers at high risk for violence.

As in *Ramirez, supra*,[14] where the information the police had was that the resident *might* have drugs and weapons, here "[t]he police certainly had a 'reasonable suspicion' that knocking and announcing their presence might be dangerous to themselves or to others.

II.

THE CRACK COCAINE AND LOADED GUN OBTAINED DURING THE SEARCH OF DEFENDANT'S HOUSE, PURSUANT TO A VALID SEARCH WARRANT, SHOULD BE PERMITTED INTO EVIDENCE WHERE THE ONLY CLAIM OF ERROR BY THE POLICE IN OBTAINING THE EVIDENCE IS THAT THERE WAS 3-5 SECONDS BETWEEN THE ANNOUNCEMENT OF THE PRESENCE AND PURPOSE OF THE POLICE AND ENTRY ONTO DEFENDANT'S PREMISES.

Standard of Review

Application of the exclusionary rule is a question of law. This Court decides questions of law *de novo*.[15]

Discussion

Defendant argues that a small variance in time, at most ten seconds, from the guidelines of the knock-and-announce rule makes the entire search unreasonable and

[13] Id.
[14] 523 US 65, 71, n 2 (1998)
[15] *People v. Stevens*, 460 Mich 626 (1999), *cert den* 528 US 1164 (2000).

therefore, the evidence obtained as a result must be suppressed under the exclusionary rule. As discussed previously, the People assert that no constitutional or statutory violation occurred, and that even if a violation of the knock-and-announce rule occurred, it still would not invalidate the search warrant.

Even if a minor defect in the manner of entry occurred, it is quite a leap to conclude that evidence obtained pursuant to a valid search warrant must be excluded.

A. Evidence obtained pursuant to a validly authorized search warrant should not be excluded where only the manner of entry, not the search, is deemed to be constitutionally infirm.

This Court has analyzed the application of the exclusionary rule to constitutional violations consistently with the United States Supreme Court's analyses.

Following this tradition, exclusion of the evidence in this case is not appropriate.

In *Segura v. United States*,[16] the Court found no need for suppression of the evidence, even though the entry was found to be "as illegal as can be." The police had no warrant, Segura was found outside and denied living at the premises, the police entered without announcing that they were police and without consent, and the officers stayed on the premises 19 hours awaiting a search warrant. Despite the total illegality of the entry, the Court decline to exclude the evidence. The Court determined that only the evidence gained from the particular violation could be excluded, and distinguished the effects of the illegal entry from the effects of the legal search.

If the search in *Segura* could be found to be unrelated to the prior entry, when the only entry was without a warrant, *this* case should not be treated more harshly,

[16] 468 U.S. 796 (1984)

where the search was pursuant to a valid warrant, and any error in the manner of entry was nominal.

Similarly, in *Ramirez, supra*,[17] the Court concluded that an entry that included destruction of property did not require exclusion of the evidence seized following the search. The Court unanimously stated: "[D]estruction of property in the course of a search may violate the Fourth Amendment, even though the entry itself is lawful and the fruits of the search are not subject to suppression."[18] Here, any Fourth Amendment violation is comparatively minor, and accordingly, the evidence should not be excluded.

Moreover, this Court previously has opined on this precise issue. In *People v Stevens*,[19] the Court refused to exclude evidence seized pursuant to a lawful search warrant, even though there was a violation of the time guidelines of the knock-and-announce rule. As here, the only defect alleged was that the police waited too short a time after the announcement of their identity and purpose to permit a response before entering.

The Court noted that observations made and materials seized as the indirect result of an unlawful search may not be entered into evidence. Here, however, the search was clearly lawful, and the evidence seized was not the "indirect result" of the entry, but rather, precisely the evidence for which the police were authorized to search.

[17] 523 US 65 (1998)
[18] Id, at 71.
[19] *People v. Stevens*, 460 Mich 626 (1999), *cert den* 528 US 1164 (2000).

Thus, in keeping with United States and Michigan Supreme Court precedents, this Court should hold that, even if a violation of the knock-and-announce rule occurred, the evidence seized should not be excluded.

B. Because the search warrant was valid, the evidence challenged would have been found in any event, thus suppression of the evidence is improper.

This Court held, in *People v Stevens,*[20] that evidence seized need not be suppressed if the prosecutor establishes by a preponderance of the evidence that the evidence inevitably would have been found in the absence of police misconduct. Here, the only allegation of "police misconduct" is that the police entered the residence about 10 seconds too soon. In *Stevens,* as here, the officers conducted the search within the scope of the warrant, and the Court held that the police would have discovered the evidence regardless of the knock-and-announce violation.

Exclusion may not be premised on the mere fact that a constitutional violation was a "but-for" cause of obtaining evidence. But-for causality is only a necessary, but not sufficient, condition for suppression. In this case, the constitutional violation from a purportedly illegal manner of entry was not a but-for cause of obtaining the evidence, since the evidence still would have been obtained without the slight illegality of an early entry. The police would have found the evidence pursuant to execution of the valid search warrant regardless of the 10 seconds additional delay propounded by Defendant..

[20] *Id.*

The United States Supreme Court has "never held that evidence is 'fruit of the poisonous tree' simply because 'it would not have come to light but for the illegal actions of the police," *Segura, supra*, at 815. Thus, even if there was a but-for causality, it would not require suppression of the evidence.

Cases excluding the fruits of unlawful *warrantless* searches, such as *Mapp v. Ohio*,[21] cited by Defendant, say nothing about the appropriateness of exclusion to vindicate the interests protected by the knock-and-announce rule. Until a valid warrant has issued, citizens are entitled to "shield their persons, houses, papers and effects"[22] from the government's scrutiny. *Mapp* simply applied this rule relating to warrantless searches to the states. Exclusion of evidence obtained unlawfully through a warrantless search vindicates the Fourth Amendment protections; exclusion of evidence obtained *lawfully*, however, through a *valid* search warrant based on probable cause furthers only a suspect's "interest" in preventing the government from seeing or taking evidence described in a warrant. Because the "interest" purportedly violated in this case has nothing to do with the legality of the seizure of the evidence, the exclusionary rule is inapplicable.

As in *Stevens*, this Court should refuse to exclude the evidence found here – crack cocaine and a loaded firearm - where the search was lawful under a valid search warrant, and the violation of the knock-and-announce rule was insignificant.

C. Public policy considerations support a conclusion by this Court that the evidence should not be excluded in this case.

[21] 367 U.S. 643 (1961)
[22] U.S. Const. Am. IV

Defendant argues that the evidence obtained pursuant to a search be excluded in every situation involving a Fourth Amendment violation, however slight. He further suggests that to admit the evidence in this case nullifies the Fourth Amendment, and its safeguards will no longer exist.

This Court and the United States Supreme Court have long recognized that not every violation requires suppression of evidence. It has always been a remedy of last resort. The exclusionary rule results in "substantial social costs," *United States v. Leon,*[23] including setting dangerous guilty criminals free. In *Colorado v. Connelly,*[24] the United States Supreme Court cautioned against expanding the rule. In *Pennsylvania Bd. of Probation and Parole v. Scott,*[25] the Court noted that it had "repeatedly emphasized that the rule's costly toll upon truth-seeking and law enforcement objectives presents a high obstacle for those urging [its] application." The Court rejected "[i]ndiscriminate application of the rule in *Leon, supra,* at 908, and has held the exclusionary rule to be applicable only "where its remedial objectives are thought most efficaciously served," *Unites States v. Calandra.*[26]

In addition to the potentially grave consequences of releasing dangerous criminals, imposing a broad standard that applies the exclusionary rule to every knock-and-announce violation would deluge the courts with claims of alleged failures to observe the knock-and-announce rule, including quibbling over a delay of second or two. Anyone charged with a crime resulting from a search and seizure could make the

[23] 468 U.S. 897, 907 (1984)
[24] 479 U.S. 157, 166 (1986)
[25] 524 U.S. 357, 364-365 (1988)
[26] 414 U.S. 338, 348 (1974)

claim; the cost is small, whereas the potential rewards - suppression of evidence, dismissal of charges – are tremendous.

Moreover, officers would be deterred from making entries in time to avoid destruction of evidence, and needless violence against officers would result. If, however, the Court holds that an error in compliance with the knock-and-announce rule in cases where a search is executed pursuant to a valid search warrant does not require exclusion of the evidence, the police are most likely to enter within a reasonable time to secure the premises, then perform the lawful search.

Defendant contends that the police will not be deterred from violating the Fourth Amendment if the evidence in this case is not excluded – that police will ignore Fourth Amendment requirements.

First, the People have *not* requested that this Court hold evidence admissible for *any* type of Fourth Amendment violation. Nor do the People suggest that the Court must extend a ruling in this case to evidence obtained without a lawful search warrant. Thus, there will not be wholesale disregard for the Fourth Amendment. The deterrent effect for searches without warrants will remain in effect and will be meaningful in those situations, as the reasonableness of a warrantless search will still require an inquiry into the manner of entry, among other aspects of the search. Ignoring the knock-and-announce requirement in the case of a search under a valid search warrant will achieve nothing but the prevention of destruction of evidence and the avoidance of life-threatening resistance by occupants of the premises – dangers which, if there is even a “reasonable suspicion” of their existence, suspend the knock-and-announcement requirement anyway.

Additionally, a person whose Fourth Amendment rights have been violated may bring a 23 USC § 1983 action against the police for the violation. In older cases, such as *Mapp*, the Defendants did not have that remedy available. Hence the only source of redress was to claim a constitutional violation, and hope that the evidence would be suppressed.

Citizens whose Fourth Amendment rights were violated by federal officers could not bring suit until 10 years after *Mapp*, with the United States Supreme Court's decision in *Bivens v. Six Unknown Fed. Narcotics Agents*.[27] Defendant Hudson, however, *may* bring such and action, and may, if the violation is proved, be able to recover not only his damages, but his attorney's fees under 42 USC § 1988(b).

Accordingly, sound public policy does not permit suppression of evidence obtained pursuant to a valid search warrant because of a minimal knock-and-announce violation, since to do so would place the public at great, and unnecessary, risk.

[27] 403 U.S. 388 (1971)

RELIEF REQUESTED

The People request that this Court hold that Defendant's rights under United States Constitution, Amendment IV, and Mich. Const. 1963, Art. I, § 11, and the statutory rights provided by MCL 780.656 were not violated when the police executed a valid search warrant, where the entry onto Defendant's premises was 3-5 seconds after announcement of their presence and purpose, and where there was probable cause to believe that Defendant would be armed and that the drugs on the premises could be quickly and easily destroyed or removed.

The People further request that this Court affirm the decisions below of the Court of Appeals and Trial Court admitting the evidence seized under a lawful search warrant, and affirm Defendant's conviction.

Dated: February 1, 2006.

Respectfully submitted,

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